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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.R. et al., Persons Coming Under the  
Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND  
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

SYLVIA A.,

Defendant and Appellant.

D056666

(Super. Ct. No. SJ12225A-B)

APPEAL from a judgment of the Superior Court of San Diego County, Gary M.  
Bubis, Judge. Affirmed.

Sylvia A. appeals following the dispositional hearing in the dependency case of her daughter J.R. and son Victor R. (together, the children). Sylvia contends the jurisdictional findings are unsupported by substantial evidence and the juvenile court

erred by finding there was clear and convincing evidence supporting the children's removal from her custody. We affirm.

### PROCEDURAL BACKGROUND

In October 2009 the San Diego County Health and Human Services Agency (the Agency) filed dependency petitions for nine-year-old J.R. and seven-year-old Victor (Welf. & Inst. Code, § 300, subd. (b)).<sup>1</sup> The petitions alleged Sylvia periodically left the children inadequately supervised and exposed them to her adult daughter Johanna R. The children were afraid of Johanna, who had a history of violence with the children and methamphetamine use. On September 27 the police arrested Johanna for being under the influence of a controlled substance, resisting an officer and child endangerment. Previously, while caring for Johanna's son Luis, Sylvia failed to follow a safety plan and permitted Johanna to abscond with Luis.

The children were detained in Polinsky Children's Center (Polinsky) and then in a foster home. In December 2009 the court entered true findings on the petitions, ordered the children placed in a foster home and issued a temporary restraining order (TRO) protecting Sylvia and the children from Johanna.

### FACTUAL BACKGROUND

In July 2009 Johanna exhibited delusional behavior and was hospitalized. Sylvia signed a safety plan promising to apply for guardianship of Luis and to prohibit unsupervised contact between Luis and Johanna. Sylvia did not apply for guardianship.

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<sup>1</sup> Statutory references are to the Welfare and Institutions Code.

In August, during a supervised visit at Sylvia's house, Johanna left the home with Luis while Sylvia was taking a shower. The police found Luis at a park with Johanna, who was under the influence of methamphetamine. Luis was detained in Polinsky. Sylvia applied for a TRO against Johanna, alleging Johanna knocked on the door so hard she made a hole in it. According to the social worker, Johanna and Sylvia sat together at the TRO hearing.<sup>2</sup> The court denied the TRO application.

On September 27, 2009, Johanna followed and yelled at the children and Sylvia's boyfriend, Gilberto O. The children and Gilberto went into a McDonald's restaurant where Victor hid under a table and shook with fear. When the police arrived, J.R. told them the following. Johanna had been staying at their house for a month. Johanna punched J.R. in the mouth one or two weeks previously, causing her lower lip to swell. Sylvia treated her lip. Since then, the children, Sylvia and Gilberto slept in a shed in their yard.<sup>3</sup> Sylvia told the children to hide from Johanna, so the children spent most weekend days, while Sylvia was working, at a park or a fast food restaurant. Gilberto confirmed that Johanna was violent. She threw a large rock through the window of the shed, breaking the window and hitting him in the head. Within the past two weeks, as Gilberto, Sylvia and the children were in their vehicle backing out of the driveway, Johanna chased them and threw glass bottles at them.

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<sup>2</sup> Sylvia testified Johanna did not attend the hearing.

<sup>3</sup> The children later said they stayed in the shed for a shorter period.

On September 28, 2009, the police went to Sylvia's home. Sylvia, Gilberto and the children were sleeping in the shed. The shed was filthy, furnished with a mattress and infested with spiders. J.R.'s feet and lower legs were covered with insect bites. There was a foul odor coming from behind the shed, where a bucket served as the toilet. The children reported Johanna had kicked Victor in the legs. Sylvia denied Johanna had hit the children. Sylvia acknowledged she and the children slept in the shed the previous night, for one night only, because she was having problems with Johanna.<sup>4</sup> Sylvia said Johanna came to the house occasionally. Sylvia claimed she did not know whether Johanna was currently in the house. The officers found Johanna in the house, under the influence of a controlled substance, and took her into custody.<sup>5</sup>

After the children were detained, J.R. told a social worker that Johanna had pushed her and hit both children, and Sylvia knew they were scared of Johanna. J.R. said she and Victor had seen Johanna's drugs. Sylvia told the social worker the children were not scared of Johanna and Johanna had not hit them, was not violent, did not use drugs, did not live in the house, had no mental health issues and was not a risk to the children. When the social worker noted that Johanna was arrested at the house, Sylvia said she had tried to get Johanna to leave but Johanna refused. Sylvia claimed the family slept in the shed because a window in the house was broken and they were afraid Johanna or

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<sup>4</sup> At trial, Sylvia testified they slept in the shed two nights.

<sup>5</sup> Johanna remained in jail until November.

someone else might enter through the broken window. Sylvia later admitted Johanna might have schizophrenia.

On September 30, 2009, Sylvia again applied for a TRO, alleging Johanna was in her house and the children were afraid of Johanna. The court granted the application.

In December 2009 Sylvia testified that Johanna last lived with her three years earlier. Since then Johanna came and went, even after she punched J.R., although Sylvia told Johanna to stay away. Sylvia was staying with a friend and planned to move to a new house in three weeks. If the children were returned to Sylvia before she moved, she would go to a shelter or stay with friends or her brother. Sylvia planned to obtain a restraining order. Johanna did not know where Sylvia lived and Sylvia would not tell her.

Sylvia testified she knew, as early as August 2009, that Johanna was a danger to the children. Sylvia admitted the children were afraid of Johanna and Johanna might have been under the influence in Sylvia's presence. Sylvia regretted leaving Luis with Johanna and using the shed as a home. Sylvia knew Johanna hit J.R., causing her lip to bleed, but noted J.R.'s mouth was not bruised. Sylvia did not call the police or seek a restraining order, but told Johanna not to touch J.R. and threatened to call the police if Johanna came to the house.

The social worker testified Sylvia's failure to remove Johanna from the home presented a safety risk to the children because Johanna was violent and emotionally abusive, and the children were terrified of her. Sylvia did not understand the risk Johanna posed and was unable to protect the children from her. Gilberto was not an

appropriate supervisor because he was afraid of Johanna and unable to protect the children.

### THE JURISDICTIONAL FINDINGS

The purpose of section 300 "is to provide maximum safety and protection for children who are currently being physically, sexually, or emotionally abused, being neglected, or being exploited, and to ensure the safety, protection, and physical and emotional well-being of children who are at risk of that harm." (§ 300.2.) Section 300, subdivision (b) allows a dependency when "[t]he child has suffered, or there is a substantial risk that the child will suffer serious physical harm or illness" because the parent has failed or is unable to provide adequate supervision or protection. Section 300 requires proof the child is subject to the defined risk of harm at the time of the jurisdictional hearing. (*In re Rocco M.* (1991) 1 Cal.App.4th 814, 824; *In re Savannah M.* (2005) 131 Cal.App.4th 1387, 1396.) A parent's "[p]ast conduct may be probative of current conditions' if there is reason to believe that the conduct will continue."<sup>6</sup> (*In re*

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<sup>6</sup> The Agency points out a conflict between *In re J.N.* (2010) 181 Cal.App.4th 1010 (*J.N.*), on which Sylvia relies, and *In re J.K.* (2009) 174 Cal.App.4th 1426 (*J.K.*). In *J.K.*, the reviewing court held that jurisdictional findings pursuant to section 300, subdivisions (a), (b) and (d), are warranted based solely on "a showing that the minor *has suffered prior* serious physical harm [or abuse]." (*J.K.*, *supra*, at p. 1434-1435; accord *In re David H.* (2008) 165 Cal.App.4th 1626, 1644 ["in the absence of unusual circumstances not present here (such as a substantial lapse of time between the incident and the filing of a petition or the date of a jurisdictional hearing), an allegation that a child *has suffered* serious physical harm inflicted nonaccidentally by the parent . . . is sufficient to establish jurisdiction under section 300, subdivision (a)"].) The reviewing court in *J.K.* determined that the evidence showed current and future risk. (*J.K.*, *supra*, at pp. 1439-1440.)

*S.O.* (2002) 103 Cal.App.4th 453, 461, citing *In re Rocco M.*, *supra*, at p. 824.) The child need not have been actually harmed for the court to assume jurisdiction. (See *In re James R.* (2009) 176 Cal.App.4th 129, 135.)

In the juvenile court, the Agency had the burden of proof by a preponderance of the evidence. (*In re Matthew S.* (1996) 41 Cal.App.4th 1311, 1318; § 355, subd. (a).) Sylvia now has the burden of showing the jurisdictional finding is unsupported by substantial evidence. (*In re Diamond H.* (2000) 82 Cal.App.4th 1127, 1135, disapproved on another ground by *Renee J. v. Superior Court* (2001) 26 Cal.4th 735, 748, fn. 6.) Viewing the record in the light most favorable to the juvenile court's order, we conclude Sylvia has not met her burden. (*In re S.A.* (2010) 182 Cal.App.4th 1128, 1140.)

Sylvia contends the McDonald's incident arose from a single error of judgment that was unlikely to recur because she recognized the danger and took steps to protect the children. The record, however, shows Sylvia began a course of neglectful conduct in August 2009, repeatedly denied the children were in danger, and failed to comprehend, by the time of the December hearing, the extent to which her poor judgment jeopardized the children's safety.

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The reviewing court in *J.N.* disagreed with *J.K.* "to the extent it concludes that section 300, subdivision (b), authorizes dependency jurisdiction based upon a single incident resulting in physical harm absent current risk." (*J.N.*, *supra*, 181 Cal.App.4th at p. 1023.) The *J.N.* court held "[t]he nature and circumstances of a single incident of harmful or potentially harmful conduct may be sufficient, in a particular case, to establish current risk depending upon present circumstances." (*Id.* at p. 1026.)

As set forth below, here there was more than a single incident of past harm and there was a current and future risk. We need not discuss the differences between *J.K.* and *In re David H.*, *supra*, 165 Cal.App.4th 1626 on the one hand, and *J.N.*, on the other hand.

Sylvia disregarded the terms of Luis's safety plan almost as soon as she agreed to them. Her disregard allowed Johanna to abscond with Luis and placed him at risk. Instead of learning from her error in judgment, Sylvia allowed Johanna repeated contact with the children, even permitting Johanna to stay in their home. Sylvia did not alter course after Johanna punched J.R., threw a large rock through the window of the shed where the family had taken refuge and threw glass bottles at the family. Sylvia's solution was to tell the children to hide from Johanna and force them to sleep in a filthy, spider-infested shed and use a bucket for a toilet. Sylvia denied the children were afraid of Johanna, although they were clearly terrified. Sylvia denied Johanna was violent, although Sylvia had witnessed Johanna's acts of violence and knew she had hit J.R. Sylvia denied Johanna used drugs, although she was aware of Johanna's drug history and the children had been exposed to Johanna's drug use. Sylvia denied Johanna lived in the house and denied she presented a risk to the children.

Only at trial did Sylvia acknowledge the children's fear of Johanna, Johanna's physical attack of J.R. and Johanna's drug use. Only at trial did she acknowledge the possibility of taking the children to stay in a shelter or with friends or relatives. Only at trial did she express regret for her breach of Luis's safety plan and for her decision to house the children in the shed. Even at trial, however, Sylvia did not show she understood why her conduct endangered the children or that she had gained the skills to protect them. Sylvia testified she was attending a parenting class, but presented no proof of enrollment. She had not started the mental health counseling she needed to understand



the risk Johanna presented to the children.<sup>7</sup> When asked why she had not taken the children to a shelter, or to the home of friends or her brother, instead of making them stay in the shed, Sylvia testified she thought "things were going to turn out all right because" she was seeking a restraining order and her "brother lives far away."

Substantial evidence supports the true findings.

### THE DISPOSITIONAL JUDGMENT

The court may remove a child from a parent's physical custody if it finds, by clear and convincing evidence, "[t]here is or would be a substantial danger to the [child's] physical health, safety, protection, or physical or emotional well-being . . . if the [child] were returned home" and there are no reasonable means of protecting the child's physical health short of removal. (§ 361, subd. (c)(1).) "The . . . minor need not have been actually harmed before removal is appropriate. The focus . . . is on averting harm to the child." (*In re Diamond H.*, *supra*, 82 Cal.App.4th at p. 1136, citations omitted.) The court may consider the parent's past conduct and current situation and gauge whether she has progressed sufficiently to eliminate any risk. (*In re S.O.*, *supra*, 103 Cal.App.4th at p. 461; cf. *In re Jonathan R.* (1989) 211 Cal.App.3d 1214, 1221.)

In the juvenile court, the Agency had the burden of showing, by clear and convincing evidence, that removal was necessary. On appeal, Sylvia has the burden of showing there is no substantial evidence to support the removal order. (*In re Diamond*

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<sup>7</sup> Sylvia testified she and Johanna attended the same drug program, were in telephone contact with each other and, by coincidence, met at a shopping center after the children were removed.

*H., supra*, 82 Cal.App.4th at p. 1135; *In re Geoffrey G.* (1979) 98 Cal.App.3d 412, 420.)

She has not met her burden.

Sylvia contends the court failed to consider her attempts to secure restraining orders, her enrollment in parenting classes and a drug education program, her remorse for allowing Johanna unsupervised contact with Luis and for housing the children in the shed, her limited contact with Johanna and her resolve to keep her new address from Johanna. Sylvia also contends the removal order does not reflect the children's wishes. Sylvia concludes her remorse, new home, participation in services, visits with the children and lack of contact with Johanna show there were means of protecting the children short of removal.

Sylvia's contentions are unavailing. Although it upset Victor to be away from Sylvia, and J.R. was sad, the children did not want to return to Sylvia if Johanna was in the home. Although Sylvia loves the children, her efforts to protect them were at most halfhearted. During visits, she repeatedly discussed this case with them, revealing her continuing poor judgment. Sylvia's history of dishonesty casts doubt on her claims of remorse, participation in services, her move to a new home and decreased contact with Johanna. Furthermore, Sylvia could have undertaken these protective measures earlier. Her eleventh-hour claims and regrets pale in comparison to the terror and violence to

which she exposed the children by allowing Johanna to have contact with them. Sylvia's promises did not suffice to protect the children. Removal was necessary.<sup>8</sup>

Substantial evidence supports the removal order.

#### DISPOSITION

The judgment is affirmed.

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O'ROURKE, J.

WE CONCUR:

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McINTYRE, Acting P. J.

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AARON, J.

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<sup>8</sup> *In re Jasmine G.* (2000) 82 Cal.App.4th 282, on which Sylvia relies, is distinguishable. There, it was established the parents had completed a parenting course and undergone therapy, and the teenage child was not afraid of the parents. (Id. at pp. 285-286, 288-289.)